Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

Officers Only Allowed to Detain Occupants In Vicinity

Officers were preparing to execute a warrant to search a basement apartment when defendants left through a door which led through the top of the building. Officers outside the residence followed defendants and pulled them over about a mile away from the apartment. The officers found keys which unlocked the apartment's interior door and led through the top of the building. Defendant was charged with three federal offenses. Defendant's motion for suppression of the keys was denied based on *Summers*, which allows officers to detain occupants of the immediate vicinity while a search warrant is being executed.

The U.S. Supreme Court held the S*ummers* rule was limited to the immediate vicinity and officers in this case did not have sufficient law enforcement interests to detain defendants nearly a mile away from the scene. The decision was reversed and remanded. *Bailey v. United States*, U.S., No. 11-770, 2/19/13

Drug Dog Alerts Presumed to Create Probable Cause

Defendant was pulled over and the officer noticed an open beer can in the car. The officer asked defendant if he could search the trunk and defendant declined. The officer then used his trained narcotics dog to search the outside of the vehicle. The dog alerted on the driver side door handle. The officer then searched the entire vehicle and only found pseudoephedrine and other ingredients to make meth, but did not find anything for which the dog was trained to alert. Defendant moved to suppress the evidence claiming there was not probable cause for the search of his car because the dog was unreliable and did not alert for drugs.

The U.S. Supreme Court held courts should determine if "all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." The Supreme Court held courts should allow the government to show why the dog is reliable and the defense to try to undermine the dogs reliability. The Supreme Court also held defendant failed to undermine the dog's reliability and reversed the Florida Supreme Court's holding suppressing the evidence. *Florida v. Harris, U.S., No. 11-817, 2/19/13*

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Padilla Does Not Apply Retroactively

Defendant was a lawful permanent resident of the United States when she was charged with mail fraud. Agents discovered defendant was part of scheme to defraud a car insurance company out of $26,000. Defendant entered into a plea deal and pled guilty to two counts of mail fraud. This subjected her to mandatory deportation. Defendant claimed her attorney never advised her of this consequence and she was ignorant of it when she pled guilty.

Defendant filed a petition for a writ of *coram nobis* in Federal District Court. While her petition was pending the U.S. Supreme Court decided *Padilla*, which held criminal defense attorneys must inform non-citizen clients of immigration consequences arising from plea agreements. This was a "new rule" because it answered the question of whether the Sixth Amendment required attorney's to advise their clients of immigration consequences arising from plea agreements.

Here, the U.S. Supreme Court held because *Padilla* established a new rule it does not apply retroactively to defendants whose convictions were already final when it was decided and so the new rule does not apply to defendant. *Chaidez v United States*, SCOTUS, Case #11-820, Feb 20, 2013

Mid-trial Acquittal Stands, Regardless of Egregious Error

At trial the district court entered a directed verdict of acquittal because it thought the State had not provided sufficient evidence of a necessary element of the crime. However, the unproven element was not required, and the State moved for retrial against defendant. Defendant argued re-trial violated the double jeopardy clause. The Michigan Supreme Court held that "[W]hen a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and re-trial is therefore not barred."

The U.S. Supreme Court relied on *Fong Foo v. United States*, 369 U. S. 141, 143 (1962), which held the double jeopardy clause bars re-trial following a court decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation. The U.S. Supreme Court held defendant's trial ended in an acquittal when the trial court ruled the State had failed to produce sufficient evidence of his guilt, regardless of the erroneous understanding of the law. Therefore, the re-trial was barred by double jeopardy. *Evans v. Michigan*, SCOTUS, Case #11-1327, Feb. 20, 2013

Federal Habeas Courts Must Presume Federal Claims Were Raised

Williams was charged with first degree murder after serving as the get away driver in a liquor store robbery which turned deadly. At trial the jury foreman reported to the judge that juror six was not willing to apply the felony-murder rule. The judge questioned the jury and dismissed juror six for bias. The jury, with an alternate juror in place, convicted Williams of first-degree murder.

On appeal Williams claimed the dismissal of juror six violated both her Sixth Amendment and California penal Code rights. The U.S. Supreme Court faced the question of whether William's federal claim was adjudicated on the merits and what the standard of review was. The court held federal habeas courts must presume, subject to rebuttal, that federal claims which were raised and denied in state court, even if not expressly addressed, were adjudicated on their merits and review them deferentially. The appellate decision was reversed and the case remanded.
Johnson v. Williams, SCOTUS, Case #11-465, Feb. 20, 2013

Plain Error At Appellate Consideration Satisfies Rule 52(b)

Defendant pled guilty to being a felon in possession of a firearm and was sentenced to a prison term of 60 months. This sentence was longer than the Federal Sentencing Guidelines and considered an "above guideline term." The judge gave this sentence to help him by qualifying him for an in-prison drug rehabilitation program. Defense counsel did not object.

Defendant appealed his sentence claiming the district court had "plainly erred in sentencing him to an above guideline prison term solely for rehabilitative purposes." Before defendant's appeal was heard the U.S. Supreme Court decided *Tapia* and held it is error for a court to lengthen a prison term to promote rehabilitation.

The U.S. Supreme Court was required to decide whether Rule 52(b) of the Federal Rules of Criminal Procedure allows the court to review an error if it was plain at trial or before appellate review. The Court applies a four part test found in *Olano* which allows an appeals court to correct a forfeited error only if: (1) there is an "error," (2) that is "plain," (3) that "affect substantial rights," and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Here, The US Supreme Court held "whether a legal question was settled or unsettled at the time of trial, it is enough that an error be plain at the time of appellate consideration for the second part of the O*lano* test to be satisfied." The appellate decision was reversed and the case remanded. *Henderson v. United States*, SCOTUS, Case #11-9307, Feb. 20, 2013

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Utah Supreme Court

Issuance of Court Order Does Not Mean Receipt of Order

Brett Perez was dismissed from South Jordan City Police in 2009. Perez was terminated for allegedly violating the City's high-speed chase policy. Perez appealed his termination to the South Jordan City Appeal Board. The Appeal Board affirmed the City's termination and issued a "Decision and Order" dated June 7, 2010.

The order was then given to the City's recorder on June 10, 2010. The recorder certified the order as final on the same day and mailed a copy and a letter to Perez. The letter informed Perez of his right to appeal within 30 day from "the date of the issuance of the final action or order of the board" and that the order was delivered to the recorder on June 10, 2010.

On July 9, 2010, Perez filed for review with the Utah Court of Appeals. The appellate court dismissed his petition for lack of jurisdiction, holding his petition was untimely under Utah Code section 10-3-1106(6) because the petition was filed more than thirty days after the date appearing on the Appeal Board's Decision and Order, which was June 7th.

The Utah Supreme Court held the final Decision and Order was issued on June 10th. The court held South Jordan City did not define "issuance" and Perez was within his rights to understand issuance as the date the order was certified and mailed. The Utah Supreme Court was clear that issuance does not mean receipt. Perez's appeal was allowed to move forward. *Perez v. South Jordan City*, 2013 UT 1

Advisory Initiatives Not Allowed On Ballot

A group named "Move to Amend Salt Lake" submitted a petition (the Petition) to the Salt Lake County Clerk for certification under Utah Code. The petition called itself a "Resolution of Support for a Constitutional Amendment to Declare that Corporations Are Not People."

The Salt Lake City Recorder was directed to reject the petition by the Salt Lake City Attorney's Office because the petition "[Did] not qualify as a proper initiative under the Utah Constitution and statutes." The City Attorney's Office found the petition was not a proper initiative because it was not "legislation" or "local law." Mr. Proulx filed a petition for Extraordinary Relief with the Utah Supreme Court requesting the court compel the Recorder to place the initiative on the City's ballot.

The Utah Supreme Court held the power of popular initiative does not include initiatives that are purely advisory and rejected Mr. Proulx's arguments holding "the constitution and state statutes do not allow anything other than "legislation" or "local laws" to be placed on the ballot." *Proulx v. Salt Lake City Recorder*, 2013 UT 2

Officer's Questions Permitted

Deputy Sheriff Luke, along with his trainee, Deputy Thomas, stopped the car defendant was riding in. Deputy Luke spoke with the driver, Kevin Sorensen, to collect his license and registration. When speaking with Sorensen Luke noticed Sorensen was impaired. Then Sorensen "blurted out…I'm not drunk, I haven't been drinking, look at my eyes." While Sorensen was getting out of the car, Deputy Luke noticed drug paraphernalia. Deputy Luke then explained to Simons, the passenger, he had seen the paraphernalia and asked Simons "if he had anything on his person [Deputy Luke] need[ed] to know about." Simons told Deputy Luke that he had a pipe in his underwear and gave the pipe to Deputy Luke. Also, Simons told Deputy Luke he had methamphetamine in his pocket. Defendant was arrested and charged with possession of drug paraphernalia and possession of a controlled substance.

Simons moved to suppress the evidence found during the traffic stop claiming the questions violated his Fourth Amendment rights. The district court denied the motion finding the officer had reasonable suspicion to justify the questions.

The Utah Supreme Court held the extension of the detention was proper to investigate Sorenson's apparent impairment. Furthermore, the supreme court held Deputy Luke's question to Simons was constitutional because the impairment of the driver and the drug paraphernalia in plain view gave the Deputy reasonable suspicion that Simons was using or possessing illegal drugs.

While the supreme court upheld the action as constitutional based on reasonable suspicion, the court also held the deputy's question was "only a de minmis extension of the stop," which provides an alternative basis for upholding the constitutional validity of the search. Basing their opinion on federal cases, the supreme court did not create a bright-line rule governing the acceptable time for a stop. Instead they held, "officers must diligently pursue the original purpose of the stop, and that while some unrelated questioning may be tolerated, officers must remain focused on the original purpose of the stop in the absence of reasonable suspicion justifying an expanded investigation;" and "Once officers complete the purpose of the original stop and dispel any reasonable suspicion generated during its pendency, they are then obligated to release the vehicle and its occupants without delay." *State v. Simmons*, 2013 UT 3

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PROSECUTOR PROFILE

Quick Facts

Born: Los Angeles, CA

Law School: University of Utah

Favorite Quote: A Latin phrase that translates to “Don’t let the bastards get you down.”

Favorite Book: #1 Ladies Detective Agency series and novels by Isabel Allende

Favorite Sports Team: Not really a big sports fan, but enjoys U of U Gymnastics

Favorite Music: Folk and Bluegrass.

Narda Beas-Nordell

Salt Lake County Deputy District Attorney

Narda Beas-Nordell is a Deputy District Attorney with the Salt Lake County District Attorney’s Office and Part-Time Tribal Court Judge with the Confederated Tribes of the Goshute Reservation (CTGR). She started with the District Attorney’s Office as a law clerk back in 1992 and was appointed by the CTGR in June of last year.

Narda grew up in Highland Park, L.A. County, and always wanted to be a ballerina when she grew up. This took her to Homboldt State University where she met her husband Layton Nordell. Layton’s book keeper used to come to the deli where Narda worked and set them up. Narda then moved to Salt Lake and finished her undergraduate degree in Physical Education (with a Minor in Spanish), hoping to teach dance at public schools.

Unfortunately she had to quit teaching dance because of some physical disabilities. So, remembering a letter she received from Victoria Palacios inviting her to apply to law school, she attended the U of U Law School and graduated in 1992. Creighton C. Horton inspired her to become a prosecutor and showed her the way. She says, “I didn’t know what to expect, but it has never been dull.”

Narda is a known workaholic, extremely dedicated and loyal to her office and loves a good mystery to solve. Maybe that is why she loves her job. Her most rewarding experience was in 2004 when a 15 year old budding serial rapist was certified into the adult system and that he is still in prison. She says, “Compassion goes a long way.” and “Don’t be discouraged if you lose a case, there is always another right behind it.” She thinks patience, tolerance and a good B.S. detector are the most important qualities of a good prosecutor. One of her most challenging experiences has been a case, involving the death of newborn, that will not go away because of continuing litigation.

Narda loves hobbies. She enjoys cooking, reading, scrapbooking, mosaics, knitting and gardening. Her favorite TV series is Masterpiece Theatre, or shows that involve excessive costuming.

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Targeted Tender Doctrine Incompatible with Utah Workers Compensation Law

While trying to change insurance companies, Pioneer Roofing Company (Pioneer) was accidently insured under two workers compensation insurance polices, WCF and UBIC. During this time of overlapping coverage a Pioneer employee suffered a catastrophic workplace injury. Pioneer intended for WCF to be the insurer covering the company at the time of the accident and tendered the claim to WCF. WCF covered all of the medical expense and weekly compensation benefits of Pioneer's employee. However, WCF became aware of the overlapping coverage and filed suit against UBIC for half of the claim's cost.

WCF filed a partial summary judgment motion claiming UBIC was jointly liable for the claim because the contracts had "Other Insurance" clauses, which stated if there was an overlap in policies both companies would equally share the loss.

UBIC filed a countermotion for summary judgment, arguing "the court should apply the so-called targeted tender doctrine." This doctrine states, "an insurer does not become liable for a loss unless the policyholder tenders a claim [to the company]." UBIC claimed it would not be liable for the claim under the targeted tender doctrine because Pioneer never tendered the claim to UBIC.

The Utah Supreme Court held "the insurer's liability attaches when the *employer* is informed of the injury," not when the policyholder tenders a claim to the insurer. For these reasons the Utah Supreme Court held the targeted tender doctrine invalid in the context of workers compensation claims.

The Utah Supreme Court held because the targeted tender doctrine is invalid, both WCF and UBIC are liable for the same loss under the doctrine of equitable contribution. The Utah Supreme Court affirmed the district court's grant of partial summary judgment for WCF and denied summary judgment for UBIC. *Workers Compensation Fund v. Utah Business Insurance Company*, 2013 UT 4

Utah Court of Appeals

Alcohol-restricted Status Allowed Trooper to Extend Scope of Stop

Trooper McCoy and his field training officer, Officer Spillman, were watching a bar in hopes of observing a DUI for training purposes. Mr. Adamson left the bar parking lot in his car. The officers noticed Admason's car did not have a light on the rear license plate. The officers followed Mr. Adamason, saw him make a moving violation and pulled him over.

Trooper McCoy spoke with Admason and obtained his ID. McCoy did not detect any odor of alcohol when obtaining the ID. McCoy then returned to his car and ran a warrant check, which revealed Adamson was an alcohol-restricted driver. McCoy had initially not noticed this restriction because Adamason had actually provided him a state ID card instead of a driver license.

Admason was prohibited from driving with any measurable or detectable amount of alcohol in his body and was required to install and maintain an ignition interlock device (IID) in his car to prevent him from driving drunk. McCoy then returned to the car and asked Adamson if he had an IID installed. Adamason showed McCoy the IID and told him, "Oh yeah, it's hanging right here." At this time McCoy could smell alcohol on Adamson and told him to get out of the car and perform a field sobriety test. Adamson failed the test and was arrested for DUI.

Adamason moved to suppress any evidence of the sobriety test, claiming the officer violated his Fourth Amendment rights when the officer extended the scope of the stop by administering test. The district court suppressed the evidence and the state appealed. The Utah Supreme Court held, "The officers did not exceed the permissible scope of the traffic stop by briefly questioning Adamson to determine whether he was in compliance with the licensing restriction that required he have an IID installed in his vehicle and…as a result, the officers' detention of Adamson for further investigation was not unreasonable and did not violate his Fourth Amendment rights." *State v. Adamson*, 2013 UT App 22

Possession of Drug Paraphernalia Not a Lesser Included Offense of Possession of Controlled Substance

Defendant was convicted of possession of a controlled substance after police found a cotton ball, containing heroin, on his person. At trial, defendant requested a jury instruction on the lesser offense of possession of drug paraphernalia. The trial court denied the request finding the offense of possession of drug paraphernalia was not a lesser included offense of possession of a controlled substance. The court of appeals affirmed, holding possession of drug paraphernalia is not an included offense of possession of a controlled substance because the prosecution must prove different elements of the crimes for conviction. *State v. Campbell*, 2013 UT App 23

State Immune Because Injuries Arose From a Natural Condition

Glaittli's boat was tethered to a boat slip at

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a floating dock on Jordanelle Reservoir. The dock was maintained by the State and was supposed to be raised and lowered with the level of the water to prevent damage to boats docked there. In June 2008 Glaittli went to the dock because a storm was approaching and he thought he should give personal attention to his boat to prevent damage. While on the dock he was hit by his boat, which broke his arm and shoulder.

Glaittli argued the State was negligent for many reasons and the State moved to dismiss for failure to state a claim based on Governmental Immunity Act of Utah (UGIA). The appellate court held the State waived immunity if, "Glaittli's injuries were proximately caused by a defective or dangerous condition on a public improvement, including a floating dock or a reservoir, or were proximately caused by the negligence of a State employee acting within the scope of the employee's duties."

However, there is exception to this waiver when an injury is caused by any natural condition on publically owned or controlled lands. The appellate court held the exception for injuries caused by a natural condition applies in this instance and therefore the State is immune from Glaittli's claim. *Glaittli v. State*, 2013 UT App 10

Failure to Give Self-Defense Instruction Was Harmless

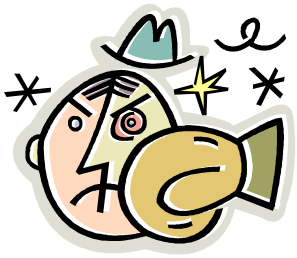
Hall punched the owner of the pizza franchise where he was employed and was charged with aggravated assault resulting in serious bodily injury and convicted of the lesser included offense of aggravated assault. On appeal Hall claimed he was unlawfully denied a jury instruction about self-defense because the trial court committed plain error by not giving the requested jury instruction sua sponte. To prove plain error, an appellant must show "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful."

The court of appeals held the absence of a self-defense instruction was harmless because "Hall's use of force could qualify as self-defense only if he reasonably believed [his actions were] necessary to prevent death or serious bodily injury." Hall failed to present any evidence which would show he believed "his use of force was necessary to prevent death or serious bodily injury." The court affirmed his conviction. *State v. Hall*, 2013 UT App 4

Defendant's Right to Appeal Was Not Unconstitutionally Denied

Kabor was sentenced for murder, obstruction of justice and three counts of discharging a firearm. Between the trial and sentencing, Kabor had multiple conversations with his attorney about his right to appeal. On the day of sentencing, Kabor told his attorney he did not intend to file an appeal. Following the sentencing, the district court failed to notify Kabor of his right to appeal.

Kabor eventually filed a notice of appeal, pro se, seventy-seven days after sentencing and at the same time filed a motion and supporting memorandum to reinstate his time to file an appeal claiming he was unconstitutionally denied the right to appeal.



The appellate court held Kabor had been adequately advised of his rights to appeal by his attorney and denied his motions. *State v. Kabor*, 2013 UT App 12

Joinder Was Proper Because of a "Visual Connection" Between Crimes

Defendant was found to have cattle from other ranches on his property and with his ear tags. When questioned about the three different cows that did not belong to him he admitted they were not his. Defendant was charged with three counts of theft of lost property. Defendant moved to sever the counts, but the trial court denied the motion.

The appellate court held joinder of offenses is allowed if the offenses charged are either based on the same conduct or part of a common scheme or plan and the defendant is not prejudiced by the joinder. The appellate court held the trial court did not exceed is discretion in finding the separate charges were part of a common scheme or plan because there was a "visual connection" between the three crimes and how they were committed. *State v. Lamb*, 2013 UT App 5

Ineffective Counsel Claim Denied as Speculative

Parker was convicted of one count of rape and appealed his conviction claiming ineffective assistance of counsel. Parker argues his counsel's actions lacked preparation and prejudiced his defense. He claims his counsel did not produce evidence which could have convinced the State to bring different charges, did not produce counter expert testimony, and did not file motions early enough to have medical testimony suppressed.

The appellate court held Parker's complaints about his attorney never established that his performance fell below the reasonable professional standards or resulted in prejudice and the defendant's claims were speculative. The court affirmed his conviction. *State v. Parker*, 2013 UT App 21

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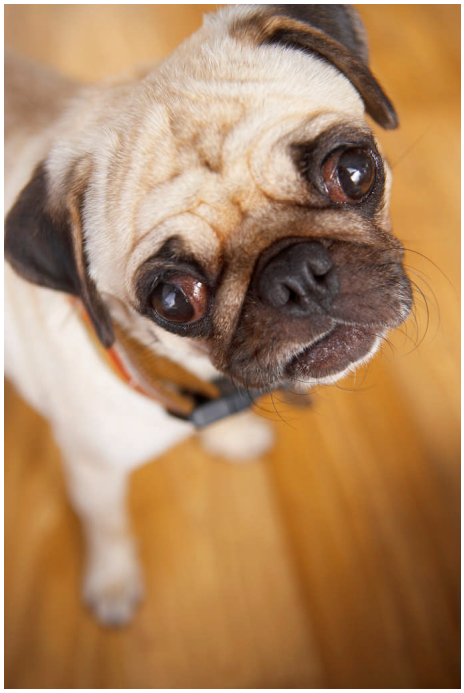
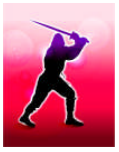
On the Lighter Side



With all the recent debate over gun control it might be good to just take a deep breath and…laugh. Here are some stories that might help you:

Riding Shotgun

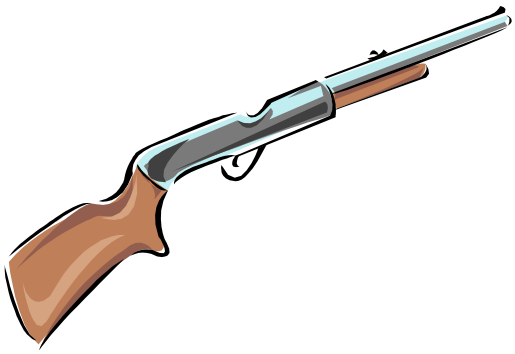
Gregory Dale Lanier's best friend might have lost that status when he shot Lanier in the leg. The best friend? His loyal hunting dog. The dog was riding "shotgun"-pun intended- when he accidently kicked the shotgun which Lanier thought was unloaded. The shotgun was laying in the passenger's seat when it went off and hit Lanier in the leg. The report from Highlands Today explains that the Sebring police "did not arrest the dog." *



Shot by Ninjas

An Illinois teenager recently blamed ninjas for shooting him. The teenager was playing with the gun when it accidently went off. When questioned about the incident the teenager reportedly told the police "that as he was riding in the car, a van full of men dressed in black clothing and "ninja-like masks" jumped out and shot him." The police were nice enough to canvas the area looking for the ninjas, but couldn't find them. The teen later admitted to shooting himself.**

Woman Shot by Oven Trying to Make Waffles



Aalaya Walker was at a friend's house when she decided to have some late-night waffles. She pre-heated the oven and was shot in the leg and chest. Obviously, she should have checked inside the oven for a loaded ammo magazine. If she had checked, she would have found her friend's .45-caliber Glock 21 magazine. While the oven heated up, the magazine exploded hitting Walker with shrapnel. However, she managed to take out the fragments and catch a bus to the hospital.***

Editor's note: This may be another argument for outlawing high capacity magazines.

*http://blogs.findlaw.com/legally_weird/2013/03/dog-shoots-owner-while-riding-shotgun.html
**http://blogs.findlaw.com/legally_weird/2013/03/teen-shoots-self-in-groin-blames-ninjas.html
***http://blogs.findlaw.com/legally_weird/2013/03/woman-cooking-waffles-shot-by-preheating-oven.html

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Priest-Penitent Privilege Waived by Defendant

The victim told her mother defendant sexually abused her, but then the victim recanted after the mother confronted defendant. In December of the same year the mother confronted defendant again because the victim's behavior had changed. Defendant admitted to the mother he had molested the victim twice. Defendant spoke to his ecclesiastical leader (Bishop) about the abuse and later classified the meeting as "Confidential clergy-penitent communication."

In preparing for trial Defendant offered the Bishop's name as a character reference to the medical professional preparing his psychosexual evaluation. The evaluation contained a statement about, "how sorry [defendant] was for what he had done." At trial the State informed defendant's counsel they would use this statement to impeach defendant if he testified he did not commit the crimes. Defendant did not take the stand and was convicted of two counts of aggravated sex abuse of a child and two counts of lewdness involving a child.

Defendant appealed claiming ineffective assistance of counsel based on his counsel's advise that he not testify because of the State's threat to impeach him. Defendant claimed the clergy-penitent privilege would have prohibited the admission of his bishop's comments, allowing him to testify and deny the charges.

The appellate court held the privilege applied, but defendant waived the privilege by allowing the doctor to contact the Bishop for the psychosexual evaluation and by providing the statement to the State. The appellate court affirmed defendant's conviction. *State v. Patterson*, 2013 UT App 11

Conviction of Operating Vehicle Without Interlock System Upheld

Defendant was convicted of operating a vehicle without an ignition interlock device (IID). He appealed, claiming insufficient evidence to support the conviction. The issue was not preserved for appeal and so he argued the district court committed plain error by failing to dismiss the charge.

Defendant argued the arresting officer's testimony about the absence of an IID was ambiguous enough to render it insufficient to support the jury's guilty verdict. Officer testified that "when I first approached [defendant's vehicle] I did notice one, then after I found [out defendant was interlock restricted], and later during the impound of the vehicle, there was no interlock in the vehicle." Defendant testified that he believed he was no longer required to have an IID because he was off probation from a prior case.

The court of appeals held the reasonable inference from the officer's testimony was that he was mistaken in his initial belief that an IID was in the vehicle, and the reasonable inference from defendant's testimony was that no IID was installed.

The appellate court held the testimony and inferences were sufficient to support the conviction and so, the district court did not commit plain error by not dismissing the charge before sending the other two charges (DUI, alcohol restricted driver) to the jury, nor was defense counsel ineffective by failing to move for a directed verdict or otherwise challenging the sufficiency of the evidence on the IID charge. *State v. Stringham*, 2013 UT App 15

Tenth Circuit Court of Appeals

The Use of Identifying Information is Suppressible

ICE agents had information that an illegal immigrant, Juan Guel-Rivera, worked at a truck wash. The agents staked out the truck wash and when a car with tinted windows arrived one of the agents thought the driver matched a photo of Guel-Rivera. After the car was stopped, defendant's brother, Armando, fled. When he was caught, Armando was determined to be an illegal immigrant. After the agent returned from chasing Armando the agent noticed defendant was not Guel-Rivera. The agent, knowing it was not the man they were looking for, asked defendant for his identification. His identification was fake and the agent quickly learned defendant was an illegal immigrant who had previously been deported.

On appeal defendant argued information agents gained from him after they noticed he was not Guel-Rivera should have been suppressed because agents did not have a reasonable suspicion he was involved in criminal activity. The district court denied his motion to suppress.

The appellate court held defendant's detention was not justified because there was no reasonable suspicion of criminal activity once defendant was determined not to be Guel-Riverea. The illegal status of Armando did not create reasonable suspicion of criminal activity because being an illegal immigrant is a status crime.

The court of appeals also rejected the trial court's finding that identifying information of is never suppressible. The court held that while the identity of someone is not suppressible, the use of identifying information, such as an ID card, may be suppressed if it is the fruit of a poisonous

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tree. *United States v. De La Cruz*, 10th Cir., No. 11-5114, 1/9/13

Defendant Convicted of Interfering with Interstate Commerce for Robbing Drug Dealer

Defendant robbed and injured a rival meth dealer stealing cash, drugs, a gun and other items. The victim, Jerabek, did not report the robbery or seek medical attention for his wound because he was afraid of being arrested. While Jerabek was recovering he was not able to leave the home to buy or sell drugs and was unable to operate his business. A few months later, Jerabek was arrested in connection with a meth trafficking investigation and he told authorities about the robbery.

Defendant was prosecuted under the Hobbs Act, 18 U.S.C § 1951, for interfering with interstate commerce by robbery or extortion. Defendant appealed his conviction claiming there was "an insufficient nexus between Jerabek's robbery and interstate commerce to support his Hobbs Act conviction."

The U.S. Court of Appeals for the Tenth Circuit held that drug dealers are businesses even though they are illegal. The court also held there was enough evidence to prove each of the elements of the crime. *United States v. Rutland*, 10th Cir., No. 11-8049, 1/22/13

Other Circuits/ States

Appellant Is Responsible to Provide Complete Record For Appellate Court

Appellant was convicted of a non-violent misdemeanor and received a sentence of ten months. His appeal was initially based on the sentence he received and he prepared a limited transcript. Appellant then learned the government had ordered and paid for the entire transcript from trial and he decided to expand his appeal using the governments record.

With deadlines approaching appellant had not received, from the government, the transcript he needed to brief his new claims. Appellant made motions for extended time and to Defer or Dispense with an appendix for the brief. Appellant was granted extended time, but ultimately was denied the motion to Defer or Dispense. Eventually, appellant submitted his brief with an incomplete record.

The appellate court held that each of his claims failed because of the lack of the record. The court held, "The appellant must provide all portions of the transcript necessary to give the court a complete and accurate record of the proceedings related to the issues on appeal" and when appellant fails to provide the complete and accurate record the court is limited to the "record that has been provided; and if the record provided is insufficient, [the] court must affirm the judgment of the court below." *United States v. Brody*, 10th Cir., No. 11-4120, 1/29/13

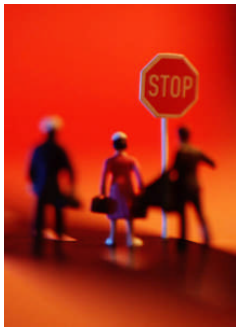
Showing the Middle Finger Does Not Create Reasonable Suspicion

Defendant "expressed his displeasure" with a police officer by showing him the middle finger. The car defendant was in was not speeding and did not commit any other traffic violations. The officer pulled the car over and defendant was eventually convicted of disorderly conduct.

The appellate court held, "This ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity." The court vacated the conviction and remanded the case to the lower courts. *Swartz v. Insogna*, 2d Cir., No. 11-2846-cv, 1/3/13

Officer Had Reasonable Suspicion to Detain Defendant for Walking Away Quickly

Defendant was standing in the parking lot of a connivance store which had a history of crime and the owner had requested the police to strictly enforce trespassing. As the officer pulled up in his car defendant and another individual started walking away from the store as fast as they could, passing the entrance of the store and continuing away from the officer. Upon instruction from the officer, defendant stopped and told the officer his name. The officer ran a warrant check, which returned an active warrant for defendant's arrest. The officer searched defendant, incident to arrest, and found a pistol in his sweater. Defendant's motion to suppress the evidence of the pistol was denied and he was convicted of possession of a firearm by a felon.



On appeal, defendant argued his motion for suppression should not have been dismissed because the officer did not have a reasonable suspicion defendant was trespassing. Accounting for all the facts, the appellate court held the officer did have reasonable suspicion because of the location, high crime area and defendant's behavior. The appellate court affirmed the conviction. *United States v. Bumpers*, 4th Cir., No. 11-4689, 1/16/13

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Non-violent Felon Has No Right to Possess Ammunition

Defendant was convicted of one felony count of a firearm offense in 1994. In 1999 he was convicted of 18 counts of firearm violations. After his release from prison, he tried to buy grenades, belted ammunition, and parachute flares from a confidential informant. He was arrested for possession of ammunition as a convicted felon. He appealed his conviction claiming it violated his Second and Fifth Amendment rights because he was a non-violent felon.

The appellate court held defendant is "hardly law-abiding and responsible" because he has twenty prior convictions involving stolen weapons, which are closely linked with violent crime. Relying on precedent, the court held "the application of the felon-in-possession prohibition to allegedly non-violent felons" does not violate the Second Amendment.

Defendant also claimed the law violated his Fifth Amendment rights because it denied him a fundamental right to bear arms. The appellate court held defendant has no right to bear arms because of his felon status. The appellate court held, "There is a plainly rational relation between the felon-in-possession prohibition as applied to a collector of dangerous, often stolen, weapons and explosives who has repeatedly and flagrantly ignored the laws of the United States and the legitimate government interest in public safety." His appeal was rejected and his conviction affirmed. *United States v. Pruess*, 4th Cir., No. 11-5127, 12/31/12

Procedure Used to Identify Defendant "Unnecessarily Suggestive"

In May of 2009 an individual robbed a bank in Kannapolis, North Carolina. Defendant was charged with armed robbery under federal law. At trial the prosecution called a bank teller to identify the robber, even though the teller was not previously able to provide a positive ID of the robber. The prosecutor asked the witness a series of leading questions about the physical appearances of the defendant and robber and any similarities between them.

Defendant was convicted of armed robbery and appealed arguing the district court erred in admitting the witness's testimony. The U.S. Court of Appeals for the Fourth Circuit uses a two-step process to determine if identification testimony is admissible. The test, established by the U.S. Supreme Court, requires the court to determine if the identification process is, "unnecessarily suggestive" and if the process was "unnecessarily suggestive," the court must then determine if the identification was still reliable. The appellate court held the procedure used here was unnecessarily suggestive because it was not obvious if outside pressures or the witness's own recollections were driving the testimony. However, the court affirmed the judgment based on other reasons laid out in the opinion. *United States v. Greene*, 4th Cir., No. 11-4683, 1/3/13

Aggravated Identity Theft Includes Consented Illegal Use of Information

Defendant, facing arrest, paid Justin Cheesbrew for Cheesbrew's driver license, social security number and birth certificate. Cheesbrew told defendant the information and did not provide any documents. Defendant then used the information to obtain a driver license in Cheesbrew's name and Cheesbrew's birth certificate. Defendant then submitted anapplication for a U.S. Passport in Cheesbrew's name. Defendant obtained the passport and fled the country. Eventually, he was caught and extradited back to the U.S., where he was convicted of aggravated identity theft.

On appeal defendant claimed he should not have been

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convicted of aggravated identity theft as a matter of law. Defendant argues the phrase, "without lawful authority," contained in the statute, does not apply to him because he obtained consent to use Cheesbrew's information illegally. The U.S. Court of Appeals for the Sixth Circuit held the phrase, "without lawful authority," as applied to the statute, "is not limited to instances of theft, but includes cases where the defendant obtained the permission of the person whose information the defendant misused." *United States v. Lumbard*, 6th Cir., No. 12-1209, 2/7/13

Formal Agreement Not Required for Bribery Conviction

Defendant received help from Frank Russo, a local politician, in running his re-election campaign. Defendant agreed to "do what Russo asked him to do, give problems special attention and follow through for Russo" in exchange for donations and staff work. Defendant was convicted of multiple honest-services fraud and mail fraud charges. At trial the jury found defendant accepted a bribe from Russo to change the outcomes of judicial decisions.

On appeal defendant argued there was insufficient evidence to prove defendant accepted a bribe. The appellate court held the jury was justified in inferring the campaign contribution from Russo was directly related to defendant's actions, which benefitted Russo. The appellate court held the government did not need to present the formal agreement between defendant and Russo, rather they only needed to show the agreement existed. *United States v. Terry*, 6th Cir., No. 11-4130, 2/14/13

Prohibition of Sex Offenders on Social Media Sites Unconstitutional

Indiana passed a law prohibiting registered sex offenders from accessing chat rooms and social media websites where minors frequent. A man filed a class action suit seeking a permanent injunction prohibiting the law. The suit claimed the law was unconstitutional and violated his First Amendment rights.

The appellate court held the law must, "Be narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication" to be found constitutional. The appellate court held the law was not narrowly tailored because it, "target[ed] substantially more activity than the evil it [sought] to redress" and because "Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders." The appellate court reversed the district court and granted the injunction. *Doe v. Prosecutor, Marion County*, 7th Cir., No. 12-2512, 1/23/13

Johns May be Prosecuted for Sex Trafficking of Minors

Defendants each responded to an undercover agent's advertisement for sex with underage girls. Each defendant discussed with the agent the age of the girls, the rates for sex and then brought money to pay for the agreed sexual acts. Defendants were arrested, charged with and convicted of attempted sex trafficking of a minor, in violation of the federal Trafficking Victim Protection Act of 2000 (TVPA). At trial defendants argued they were not "sex traffickers" of children, rather consumers of sexual acts with children.

The U.S Court of Appeals for the Eighth Circuit held the text of TVPA does not "expressly limit its provisions to suppliers" and "criminalizes a broad spectrum of conduct relating to the sex trafficking of children." The court held TVPA applies to both suppliers and purchasers of sexual acts committed by children. The court's expansive reading of TVPA allows prosecutors to charge anyone who participates in any way in the sex trafficking of a minor. The appellate court reversed the district court for each defendant and instructed them to reinstate the conviction and proceed to sentencing. *United States v. Jungers*, 8th Cir., No. 12-1006, 1/7/13

Government Cannot Bully Its' Own Witness

Defendant and his wife, C.J., got into an argument after drinking alcohol and using cocaine. Defendant punched, kicked and ran over C.J. with his SUV during the argument. C.J. was taken to the hospital, where a police detective interviewed her and she claimed defendant beat and ran over her.

At trial C.J. had to be compelled to take the stand and then stated it was just an accident that she fell behind the SUV and was injured. The prosecution insisted that C.J. was lying and convinced the court to appoint her counsel because she was perjuring herself. After C.J. consulted with her newly appointed counsel she testified defendant beat her and ran over her with his SUV. Defendant was convicted of felony and misdemeanour assault.

On appeal defendant argued the government violated his Fifth Amendment rights by threatening the witness. The appellate court held the government violated its duty to stay neutral when prosecuting a case "by bullying [the] prosecution witness away from testimony that could undermine the government's case" and the court saw "no reason to doubt that the government's substantial

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interference with the testimony of its own witnesses can violate the Due Process Clause." The court, upholding defendant's conviction, held in this instance the witness was not bullied and there was no violation of defendant's Due Process rights. *United States v. Juan*, 9th Cir., No. 11-10539, 1/7/13

Disguise During Testimony Does Not Violate Confrontation Clause

Defendant was arrested for accepting a fee to deliver ten pounds of meth to an undercover agent. Before trial the government asked the court if the confidential informant (CI) could wear sunglasses, a fake mustache and a wig during his testimony. The CI claimed he was involved in dangerous investigations into a drug cartel and wished to protect his identity. The CI was permitted to wear the wig and mustache, but not the sunglasses. The court wanted to allow his eyes and full face to be visible while testifying.

Defendant appealed, claiming the disguise violated the Confrontation Clause. The appellate court applied a test from *Craig* (497 U.S. at 850) stating, "courts should consider whether the disguise furthers an important state interest and whether the reliability of the evidence could be otherwise assured."

The appellate court held the reliability of a witness's testimony depends on four factors: physical presence, oath, cross-examination and observation of demeanor by the trier of fact. The appellate court held the jury could observe the demeanor of the witness because they could hear his voice, view his full face and eyes and watch his reactions to questions. The appellate court held this disguise did not violate the Confrontation Clause because the government met the four factors. *United States v. Jesus-Casteneda*, 9th Cir., No. 11-10397, 1/30/13

Defendant has Burden of Proof Concerning Public Authority Defense

Defendant was a resident of Mexico and provided information to the FBI about drug activity and asked for admission to the US and protection in return. The FBI started to take the steps to develop defendant as a confidential informant, but never gave him directions to buy or sell drugs. Defendant then became involved in a police investigation by the Fresno Police Department and was asked if he could sell an undercover officer cocaine. Defendant told them not at that time, but knew someone who could sell the officer meth. The meth was sold and the officer again asked defendant if he could sell him cocaine. Defendant arranged for the sale of the cocaine and met to make the exchange. Defendant was then arrested and charged. At trial defendant raised a public authority defense. Eventually defendant was convicted of conspiracy to distribute methamphetamine, cocaine and possession of controlled substances.

On appeal, defendant claimed the jury instruction about his public authority defense should have contained language informing the jury, "the government must prove beyond a reasonable doubt that defendant did not have a reasonable belief that defendant was acting as an authorized government agent to assist in law enforcement." The appellate court held "defendant had the burden of establishing the defense by a preponderance of the evidence and it was not an error for the district court to refuse to instruct the jury otherwise." The appellate court held the trial court did commit an error by not giving any instruction on the burden of proof and standard of error. For that reason the case was remanded. *United States v. Doe*, 9th Cir., No. 11-10067, 1/31/13

Federal Statute Requires Defendant to Authorize Funds

Defendant brokered a deal between his supervisors and his wife so the Head Start Program would purchase copies of the book his wife had recently written. Defendant did not tell his supervisors his wife had written the book when he presented it to them and made sure the purchase was within the amount which could be authorized by his immediate supervisors. The prosecution claimed these actions "intentionally misapplied" property of the Head Star program, which was the essential element in the case against defendant.

The appellate court held "evidence of an undisclosed conflict of interest is insufficient, standing alone, to sustain a conviction for "intentionally misapplying" funds within the meaning of [the statute]." The court of appeals was concerned about expanding the definition of "intentionally misapplying" funds to people who can't directly authorize the use of funds. The court of appeals held, "One cannot 'misapply' funds without having 'applied' them in the first place," reversing defendant's conviction because of insufficient evidence that defendant directed any funds at all. *United States v. Jimenez*, 11th Cir., No. 11-15039, 1/25/13

Testimony of Pathologist Who Did Not Participate in Autopsy Is A *Crawford* Violation

Two victims were shot while leaning on the side of a car talking to the people inside the car. Defendant was the front seat passenger in the car when the victims were shot. There were multiple conflicting testimonies of who shot the victims, so the

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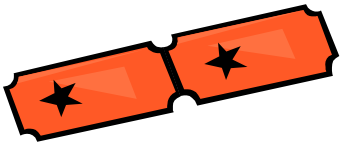
prosecution used an autopsy report and the testimony of a pathologist to show the jury where the gun was fired from. The pathologist was not involved in the autopsies, but testified the gun was fired from a distance farther away than the driver. Defendant was convicted of first-degree murder.

The appellate court held the pathologist's trial opinion was a *Crawford* violation because the pathologist did not participate in the autopsy. The court held this is a *Crawford* violation because: 1) the report contained statements that were made with prosecution in mind; 2) the statements in the report were related to the jury and were offered to prove the truth of the matter asserted; 3) the pathologist who made the report did not testify at trial and was not available for cross-examination. *State v. Navarette, N.M., No. 32,898, 1/17/13*

Fraud Does Not Require Explicit Quid Pro Quo

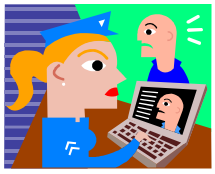
Defendant, Kevin Ring, worked for Jack Abramoff as a lobbyist. He managed some of Abramoff's most important clients. Ring gave campaign contributions and treated officials to dinners, drinks, travel, concerts and sporting events. Eventually a federal investigation discovered Ring was providing these dinners, tickets, and events in return for official acts which benefited his clients. Ring was convicted of multiple counts of honest-services fraud.

Ring appealed claiming: 1) an explicit quid pro quo was required; 2) the official must agree to the exchange; and 3) a corrupt agreement must be offered.



The appellate court rejected the need for evidence showing an explicit quid pro quo holding "there is a First Amendment interest in having lobbyist testify and inform politicians, but there is no First Amendment interest in taking officials to sporting events." The court also held the statute criminalizes an offer of something with the intent to influence an official act, but there does not need to be an agreement made. Lastly, the court held the jury instructions that were used at trial captured the requirement that the corrupt agreement must be offered and the official must know that there was an offer. The court affirmed Ring's convictions after rejecting his arguments. *United States v. Ring*, D.C. Cir., No. 11-3100, 1/25/13

Warrant Checks Allowed Even When Not Related to Suspected Crime



Defendant was found sitting in his car in front of a restaurant. Officers were suspicious of defendant because the area had a recent history of violence. Officers testified a person who waits outside this particular restaurant is more likely to have a weapon because the restaurant regularly conducts pat-downs of its patrons. Upon talking to defendant officers started a check for any outstanding warrants. While the warrant check was happening, one of the officers continued to talk to defendant and noticed he kept touching his pocket. The officer, suspecting defendant had a weapon or contraband, ordered defendant out of the car and performed a *Terry* stop. The *Terry* stop revealed a gun in defendant's pocket. Around the same time the gun was found, the warrant check informed the officers that defendant had an outstanding warrant for his arrest.

Defendant was convicted of being a felon in possession of a firearm after his motion to suppress was denied. Defendant appealed claiming his Fourth Amendment rights were violated because the stop was unreasonably extended. The appellate court held officers do not exceed the permissible scope of a *Terry* stop by running a warrant check, even when the check is not related to the suspected crime. The appellate court affirmed the denial of the motion to suppress. *United States v. Young*, 6th Cir., No. 11-2296, 2/5/13

Defendant Was Not Subjected to Express Questioning

Defendant and the victim fought over a gun during a drug deal and the victim was shot and killed. Defendant was taken into custody and read his *Miranda* rights. After the officer read defendant his *Miranda* rights he presented defendant with a form to sign if defendant wanted to talk to the officer. Defendant declined to talk to the officer and then the officer said, "The only thing that I can tell you is this, and I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay." After which defendant stated "I didn't even mean for it to happen like that. It was a complete accident."

Defendant's motion to suppress the statement was denied and the Supreme Court of Michigan reviewed the case. The supreme court held defendant was not "subjected to express questioning after he invoked his right to remain silent" for many reasons when viewing the totality of the circumstances. *People v. White*, Mich., No. 144387, 2/13/13

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 23-24	UPC SPRING CONFERENCE *Case law and legislative update, Use of Force training and civility*	Sheraton Hotel Salt Lake City, UT
April 25-26	26th Annual Crime Victims Conference *Sponsored by the Utah Office for Victims of Crime* Registration Flyer	Zermat Resort Midway, UT
May 14-16	ANNUAL CHILD ABUSE AND DOMESTIC VIOLENCE CONFERENCE *Sponsored jointly by the Children's Justice Centers and UPC*	Zermat Resort Midway, UT
June 19-21	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE *Training for the non-attorney staff in prosecution offices*	Ruby's Inn Bryce City, UT
August 1-2	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE *For city prosecutors and all others whose case load is largely misdemeanor*	Capitol Reef Resort Torrey, UT
August 19-23	BASIC PROSECUTOR COURSE *Trial ad and substantive legal instruction for new prosecutors*	University Inn Logan, UT
September 11-13	FALL PROSECUTORS' TRAINING CONFERENCE *The annual CLE event for all Utah prosecutors*	Riverwoods Logan, UT
October 16-18	GOVERNMENT CIVIL PRACTICE CONFERENCE *CLE for civil side attorneys from counties and cities*	Zion Park Inn Springdale, UT
November 20-22	ADVANCED TRIAL SKILLS COURSE *For felony prosecutors with 4+ years of prosecution experience*	Hampton Inn West Jordan, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME *This 2 day course will be held in 22 different locations throughout the country during 2013* Flyer Registration Lodging Scholarship Application	
May 20-24	GOVERNMENT CIVIL PRACTICE CONFERENCE Summary *Specifically designed for attorneys involved in the civil arena of public service.*	Salt Lake City, UT
June 17-26	CAREER PROSECUTOR COURSE Summary *Designed for those who have committed to prosecution as a career. Trial advocacy, leadership skills, and substantive legal training*	San Diego, CA

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2012 Training Calendar

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July 24-27	ASSOC. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION		Washington, DC
	For more information about and registration forms for the 2013 AGACL conference, visit www.agacl.com or call Susan Wilhelm at (512) 240-5489.		
July 29– Aug. 2	PROSECUTING HOMICIDE CASES	Summary	Seattle, WA
	Covering all aspects of a homicide case; including investigation, case management, pre-trial and trial.		
August 19-23	PROSECUTING SEXUAL ASSAULT CASES	Summary	Denver, CO
	Learn to address the unique issues in sexual assault cases: evidence, trial advocacy, victim issues, ethics, etc.		
September 9-13	PROSECUTING DRUG CASES	Summary	Las Vegas, NV
	NDAA's popular course for narcotics prosecutors and investigators.		

*****For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no "Summary" or "Register" links, that information has not yet been posted on the NDAA website.